OEDCA DIGEST

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Office of Employment Discrimination
Complaint Adjudication

Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent, adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final decision or order on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include settlement agreements, disability discrimination, retaliation, and harassment.

Also included in this issue are articles on the right of Title 38 employees to appeal RIFs (Reductions-in-Force) to the Merit Systems Protection Board and the use of the "direct threat" defense by management in disability cases. The later article is especially timely in light of the U.S. Supreme Court's recent decision in the case of *Chevron U.S.A. v. Echazabal,* decided on June 10, 2002.

The *OEDCA Digest* is available on the World Wide Web at: *www.va.gov/orm*.

CHARLES R. DELOBE

I

EMPLOYEE RESPONSIBLE FOR ENSURING THAT APPLICATION FOR PROMOTION IS ADEQUATE AND COMPLETE

The complainant, a GS-9 Veterans Claims Examiner at a VA regional office, applied for the position of Personnel Management Specialist, GS-11/12/13. The position required, among other things, one year of specialized personnel-related experience at the GS-9 level.

A specialist in the Human Resources Service (HR) reviewed the applications to determine if the applicants met the qualifications for the position. She determined that the complainant lacked specialized experience. Accordingly, she notified him that he would not be referred to the selection official for consideration because he was unqualified. The complainant thereafter alleged that HR's decision to disqualify him was, among other things, racially motivated.

After reviewing the evidence in the record, OEDCA agreed with and accepted an EEOC judge's decision that the complainant was not discriminated against because of his race. The complainant's application contained no indication that he had any personnel experience. The complainant admitted that his application did not reference such experience, but argued that the HR specialist should have contacted him if she felt his application was inadequate or incomplete.
Both the EEOC judge and OEDCA rejected his argument, however, and concluded that HR had no obligation to contact the complainant for the purpose of giving him another opportunity to explain his qualifications, and that the failure to contact him was not racially motivated.

The argument presented by the complainant in this case is not uncommon. Many employees mistakenly believe that it is HR's responsibility to make sure that their applications contain sufficient information with respect to their qualifications, and that HR should alert them to any problems in that regard before disqualifying them. The burden, however, is always on the applicant to ensure that an application package includes adequate information concerning experience, education and other qualifications related to the job in question.

Of course, if an HR specialist contacts some applicants about application deficiencies, but not others, a legitimate question can and should be raised as to the reasons for the difference in treatment. However, there was no evidence in this case that the HR specialist contacted any applicants prior to issuing the qualification and disqualification notices.

II

EEOC UPHOLDS OEDCA'S FINDING OF DISCRIMINATION

While not a frequent occurrence,

OEDCA does occasionally reject an EEOC administrative judge's finding of **no** discrimination and finds, instead, for the complainant.

In this particular case, involving a non-selection, a supervisor (hereinafter "RMO") had made a statement, overheard by another supervisor, that he would no longer hire females because, in his experience, they had a higher rate of absenteeism than males. The complainant, a female, applied but was not selected for a position for which the RMO was the selecting official.

In his decision, the EEOC judge correctly found that the selecting official had made the statement about not wanting to hire females. The judge also found, again correctly, that even absent the selecting official's evident bias, the complainant would not have been chosen for the position because the male selectee was far better qualified. The judge therefore found, this time incorrectly, that because the complainant would not have been chosen in any event, she was not discriminated against and, therefore, not entitled to any remedies.

While OEDCA agreed with the judge's findings of fact, it disagreed with the judge's ultimate finding of no discrimination. OEDCA found that the judge had failed to apply the proper legal standard. Prior to *The Civil Rights Act of 1991*, an employer could avoid liability in a case where there is direct evidence of discriminatory motive, if it could show that it would have made the same decision even absent the discriminatory motive.

In 1991, Congress changed this rule so that complainants in such cases would be entitled to a finding of discrimination, but the tangible remedies would essentially be limited to attorney's fees and costs. They would not be entitled to other common forms of relief, such as back pay, offers of reinstatement or placement, and compensatory damages.

The EEOC judge in this case erroneously applied the old rule rather than the rule established by *The Civil Rights Act of 1991*. OEDCA therefore found that the complainant was discriminated against. However, since clear and convincing evidence demonstrated that she would not have been chosen, even absent the discriminatory motive, OEDCA found that the remedies to which she was entitled were basically limited to her attorney's fees and costs.

Strange as it may seem, because OEDCA rejected the EEOC' judge's finding of no discrimination, it was required by regulation to "appeal" it to the EEOC's Office of Federal Operations (OFO) in Washington, D.C. On appeal, the OFO reversed the EEOC judge's decision and affirmed OEDCA's final action finding discrimination. The OFO found, just like OEDCA, that the judge had applied an incorrect legal analysis.

This case highlights a significant flaw in

EEOC's complaint processing regulation – namely – that an agency is not allowed to issue its own separate decision in cases where a judge has issued an erroneous decision against a complainant. Instead of being allowed to issue a decision finding discrimination and award relief immediately, agencies are required to "appeal" the judge's decision to EEOC -- a lengthy and unnecessary exercise that accomplishes nothing other than delaying final resolution of the complaint.

This case also demonstrates the fact that OEDCA -- an independent EEO adjudication body within the Department of Veterans Affairs -- does not simply "rubber-stamp" decisions from EEOC administrative judges, even when such decisions favor the Department. The decision and record in each such case are carefully reviewed to ensure that the EEOC judge's findings and conclusions are both factually and legally correct. In this case, OEDCA found that the judge's decision was factually correct, but legally incorrect.

III

SETTLEMENT AGREEMENT THAT PROMISES ONLY TO "CONSIDER" SOMETHING LACKS "CONSIDERATION"

(The following cases involve another Federal agency. However, the lesson they teach concerns a basic requirement for valid settlement agreements and is one that VA officials contemplating EEO settlements should heed.)

In two recent cases involving the U.S. Postal Service, the Equal Employment Opportunity Commission (EEOC) invalidated settlement agreements and ordered the underlying complaints reinstated for continued processing after the complainants alleged that the Postal Service had breached the agreements.

In the first case, the complainant withdrew her complaint pursuant to a written settlement agreement. In return for her promise to withdraw her complaint, the Postal Service promised "*to fully explore every opportunity to consider* [her] for Tour II duty after the first of the year 2001." She never received Tour II duty in 2001 and, therefore, filed a claim alleging breach of the settlement agreement. The Postal Service argued that there was no breach because it did what it promised to do in the agreement – it "considered" her for the tour. The agreement, said the Postal Service, did not require that she actually be given a Tour II assignment.

The Commission acknowledged that the settlement agreement did not require the Postal Service to give the complainant a Tour II assignment. For that very reason, however, it also found that the agreement was invalid. In other words, the Commission found the Postal Service's promise so vague as to render the entire agreement void because it lacked sufficient "consideration." In contract law, consideration is one of the essential

requirements for a valid contract. In layman's language, consideration is present in an agreement when each party gives or gives up something in return for getting something.

In this case, the complainant clearly gave up something very tangible — the right to continue having her EEO complaint processed -- while the Postal Service gave nothing in return. A mere promise to "consider" doing something is illusory; it imposes no obligation to actually do it. It is tantamount to saying "We'll think about it." Such a promise is not sufficient to create an enforceable contract. Because consideration was lacking, the Commission voided the settlement agreement, reinstated the EEO complaint, and ordered the Postal Service to continue processing it.

In another case involving a claim of hostile environment harassment, the Postal Service managed to convince an employee to withdraw her harassment complaint in return for what amounted to nothing more than a promise not to harass her anymore. For reasons similar to those noted above, the Commission voided the agreement for lack of consideration, reinstated the complaint, and ordered the Postal Service to continue processing it. The Commission concluded that a mere promise to ensure the complainant "the right to work in an environment free of harassment" involved a legal obligation that the law already places on employers. Thus, aside from promising to obey the law – something which it is obligated to do anyway – the Postal Service incurred no obligation whatsoever in return for the complainant's promise to withdraw her complaint. The agreement therefore lacked consideration.

Management officials and complainants alike should be mindful of these cases when negotiating a settlement agreement.

IV

NO "MEETING OF THE MINDS" RESULTS IN VOID SETTLEMENT AGREEMENT

(This case, also involving another Federal agency, addresses yet another very common pitfall to avoid when contemplating a settlement agreement.)

The two cases discussed in the preceding section concern the legal requirement that an agreement be supported by "consideration." Another prerequisite to a valid agreement is that there be a "meeting of the minds." In layman's language, this means that both parties must have had the same basic understanding as to the meaning of the terms of the agreement at the time they signed it.

In a recent case involving the Department of Defense, an employee had filed an EEO complaint alleging that his suggestions were not fairly evaluated by the agency. To settle the complaint, the agency and the employee signed an

agreement wherein the agency agreed to appoint a "disinterested party" to re-evaluate his suggestions.

Soon after the parties signed the agreement, the agency appointed an official who was within the chain-of-command of the individual who had disapproved of the employee's suggestions when they were initially proposed. The employee objected to this appointment, claiming that the agency had violated the settlement agreement by appointing someone who, according to the employee, did not fit the definition of a "disinterested party."

The agency countered by arguing that it had not breached the agreement because, according to the agency, the term "disinterested party" meant nothing more than having the employee's suggestions reevaluated by a person not involved in the initial evaluation.

After reviewing the facts and arguments of the parties, the EEOC ruled in favor of the employee. Specifically, the Commission found that the parties had contemplated something very different in terms of what constituted a "disinterested party." As there was a mutual mistake of fact regarding the definition of that phrase, there was no meeting of the minds at the time the parties entered the agreement. Because there was no "meeting of the minds", the Commission held that the agreement was void.

The moral of this story is obvious. Both parties to a settlement agreement should carefully review the document to ensure that they understand the precise meaning of the words and phrases used in the agreement. In this case, both sides clearly agreed to the appointment of a "disinterested party", but each side entered the agreement with a significantly different understanding as to what that phrase meant.

V

HEART CONDITION THAT PREVENTS COMPLAINANT FROM BENCH PRESSING 370 POUNDS NOT A DISABILITY

In a not too surprising ruling, an EEOC administrative judge recently issued a decision finding that the inability to bench-press heavy weights is not a significant limitation of a major life activity.

The complainant had applied unsuccessfully for two positions advertised in a vacancy announcement at a VA medical center. A facility HR specialist determined that he was unqualified for one position, but found him qualified for the second position and referred him to a selecting official, who chose another applicant. The complainant thereafter alleged, among other things, that his nonselection and disqualification for these positions was due to discrimination because of a disability, *i.e.,* his heart condition.

The EEOC administrative judge found,

and OEDCA agreed, that the complainant had failed to prove the existence of a disability within the meaning of *The Rehabilitation Act* and *The Americans with Disabilities Act*. To prove disability status, it is not enough merely to submit evidence of a medical diagnosis of an impairment. In order for a medical condition, such as a heart problem, to constitute a "disability" within the meaning of the above statutes, the condition must substantially limit one or more major life activities.

Major life activities are those activities that are of central importance to daily life. Common examples include walking, performing manual tasks, seeing, hearing, breathing, learning, and working. Lifting is also considered to be a major life activity.

The term "substantially limits" means (i) unable to perform a major life activity that the average person in the general population can perform, or (ii) significantly restricted as to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

In the complainant's case, the evidence showed that his heart condition did not prevent him from doing his job, and the only activity limitation he mentioned was his inability to bench-press 370 pounds. The EEOC judge correctly found that while lifting may be a major life activity, the complainant's heart condition did not substantially limit that activity. The average healthy person in the general population is unable to lift 370 pounds.

Since the complainant's heart condition did not significantly limit any of his major life activities, he was unable to establish the existence of a disability. Hence, he was not discriminated against because of a disability.

VI

JOB APPLICANT'S OBESITY DID NOT SUBSTANTIALLY LIMIT HER MAJOR LIFE ACTIVITIES – HENCE SHE WAS NOT DISABLED.

The complainant applied, but was not hired, for a nursing assistant position. The reason given for her nonselection was that she was overweight – 256 pounds – and unable to pass a physical examination. She thereafter alleged, among other things, that her nonselection was due to discrimination because of a disability – obesity.

The principal duties of the nursing position in question included bathing, lifting, and turning patients, and other physical activities that required frequent bending, stooping, and climbing. Part of her physical examination included a functional abilities test designed to determine an applicant's range of motion. The complainant failed this test because she was unable to stoop, bend her knees, climb, or "walk like a duck."

Nursing officials indicated that these tests were important and relevant in determining an applicant's ability to perform the essential duties of a nursing assistant, and provided examples of common situations where these types of physical abilities would be required.

After reviewing the evidence, OEDCA concluded that the complainant's obesity did not constitute a disability within the meaning of *The Rehabilitation Act* and *The Americans with Disabilities Act*. The complainant, while claiming that she is disabled because of her obesity, admitted that her weight did not substantially limit any of her major life activities, including working, and that she could perform the duties of the position without assistance.

As noted in the preceding case summary, in order for a medical condition to constitute a "disability", it must substantially limit one or more major life activities. The complainant's own testimony suggests that her obesity does not substantially limit any of her major life activities. It was also clear from the record that the VA did not perceive her as being disabled. Instead, the VA simply perceived her as being unable to perform the physical requirements associated with that particular job. Hence, the complainant, despite her obesity, was not disabled within the meaning of the above statutes.

Even if it could be argued that the complainant is disabled, she was not discriminated against because she was not a "qualified individual with a disability." She was found unqualified for the position by virtue of her physical inability to perform the essential duties of the job.

VII

REPRIMAND ISSUED IN RETALIATION FOR EMPLOYEE'S PRIOR EEO COMPLAINT ACTIVITY

OEDCA recently accepted an EEOC judge's decision finding that the complainant had been subjected to unlawful reprisal in connection with a reprimand he received from his supervisor.

The complaint, a nursing assistant, filed an EEO complaint in January 1999. In June 1999, an EEO investigator interviewed his supervisor concerning the complaint. A few days later, his supervisor began an investigation into an incident involving alleged inappropriate behavior by the complainant. The principal allegation against him was that he had a female employee sitting on his lap in a patient's room. In September 1999, the complainant received a written reprimand based on the results of the supervisor's investigation. The complainant then filed a second complaint, alleging that the reprimand was unwarranted and an act of retaliation for his earlier EEO complaint against the supervisor.

The complainant denied the allegation and testified as follows. He was present

in the patient's room at the time in question and was seated in a chair near the patient's bed. He had stopped by the patient's room to say hello and chat with him for a few minutes. A female nursing assistant (NA1) was in the room at the time feeding the patient. The patient then slouched over in the bed while being fed and another female nursing assistant (NA2), who was passing by the room, saw what had happened and entered the room to assist NA1 in lifting the patient. As NA2 tried to pass between the bed and the chair in which the complainant was seated, she tripped and started to fall, but caught her balance by placing her hand on the complainant's shoulder.

The supervisor testified that she relied on written statements provided to her by a registered nurse and the patient. She claimed that, according to the RN's statement, the RN was walking by the patient's room when she saw the complainant with a female coworker sitting on his lap. The supervisor claimed that the patient provided a similar statement.

The EEOC judge found that neither of these statements supported the supervisor's decision to reprimand the complainant. The RN testified that when she glanced into the patient's room, it appeared as though a female employee (NA2) was sitting on the complainant's lap. However, shortly after providing her statement to the supervisor the RN spoke with NA2, who explained to her what had happened. The RN accepted that explanation, as it was not inconsistent with what she saw and advised the supervisor, in writing, of these additional facts. The supervisor, however, disregarded that explanation.

The patient in question, a 77 year-old quadriplegic, gave a verbal statement to the supervisor. His statement, however, merely indicates that while being fed, he turned his head to the left and saw a female employee leaving the complainant's lap. Again, the patient's statement was not necessarily inconsistent with NA2's version of the incident.

NA1's recollection of the events differed slightly from that of NA2, but she did recall hearing NA2 yell out, "What, are you trying to trip me?" Prior to that she recalled seeing the complainant sitting in a chair while NA2 was standing.

According to the record, the complainant had never previously been disciplined, and all of his performance appraisals were satisfactory.

The EEOC judge concluded that the supervisor's testimony as to her motives was not credible, and that the preponderance of the evidence pointed to reprisal as the motivating factor behind the reprimand. The supervisor ignored evidence favorable to the complainant and chose instead to proceed with the reprimand, even when it became clear that the initial report of the incident might have been inaccurate. The judge also noted the complainant's unblemished work record and the short period

of time — approximately six days — between the supervisor's interview with the EEO investigator regarding the complainant's earlier complaint and her initiation of the investigation into this incident.

VIII

COMPLAINANT NOT HARASSED WHEN MANAGEMENT INVESTIGATED ALLEGATIONS THAT HE HAD SEXUALLY HARASSED A COWORKER

When accused of sexual harassment, some employees believe that a good offense is the best defense. Thus, it's not only the victims of sexual harassment who file complaints. Occasionally the alleged harasser will file one after learning that he (or she) has been accused of sexual harassment and is the subject of a formal or informal investigation.

In a recent case, an employee accused of sexually harassing a coworker alleged that management officials had discriminated against him because of his race and gender by investigating the coworker's accusations and by ordering him to stay away from the coworker pending the outcome of the investigation. The coworker had complained to upper level management officials that the complainant would frequent her work area and "just stand there and glare" at her in what she perceived to be a menacing and hostile manner.

After reviewing the evidence in the record, OEDCA agreed with an EEOC administrative judge's decision that management did not discriminate against or harass the complainant when it investigated her allegations. The judge correctly noted that employers have a legal obligation to do exactly what VA management officials did in this case, *i.e.*, immediately investigate the accusation and take interim steps, pending the outcome of the investigation, to prevent contact between the alleged victim and the alleged harasser.

Even assuming for the sake of argument that the alleged victim's charge turned out to be false, management's actions were perfectly appropriate, and the complainant presented no evidence that those actions were taken due to his race or gender.

IX

HYPERSENSITIVITY TO CHEMICAL IRRITANTS AND ODORS IN THE WORKPLACE FOUND NOT TO BE A "DISABILITY"

An employee recently alleged that her hypersensitivity to chemical irritants and odors at a VA hospital rendered her disabled within the meaning of *The Rehabilitation Act* and *The Americans with Disabilities Act*. She further alleged that management officials failed to honor her request for an accommodation that would shield her from these irritants.

According to the evidence presented at a hearing, the complainant, a program clerk, suffered the following symptoms while working in a variety of locations at the hospital: burning and swelling of the eyes, nasal passages, throat, lips, inside of mouth, tongue, and esophagus; tooth aches; occasional acid taste in the mouth with loss of ability to taste; nose bleeds; difficulty talking; blurred vision; nausea and vomiting; rhinitis; restricted breathing and palpitations; hives; prickly skin; and itching.

According to her testimony, the problems were most severe when she came into contact with employees who wore perfumes and other strong fragrances, and that the symptoms would subside when she was not exposed to those employees. She further testified that she had these problems only when she was at the hospital; she did not experience these symptoms before entering the building in the morning or after leaving the building in the afternoon.

The complainant's physician submitted a written request that the complainant could be accommodated if given a work area with floor-to-wall partitions on all sides to shield her from the odors and fragrances of other employees and a HEPA air filtration system within that fully enclosed area.

Management officials did not provide a fully enclosed work area, but did offer to change her work hours so that she could handle certain duties when other employees were not in the area, and to provide her with a HEPA filtration system in her work area. It was later determined that the HEPA filtration system would not work in an open area, as it would actually draw in fragrances and odors from other locations.

Management also attempted to accommodate her by changing her work area, but she continued to experience the problems, as she was constantly coming into contact with other fragrance-wearing employees. Management did not provide a private office or a fully enclosed work area as the complainant had requested.

After reviewing the record, OEDCA agreed with an EEOC judge's conclusion that the VA did not violate *The Rehabilitation Act* or the *Americans with Disabilities Act*. The judge correctly noted that, while the complainant's condition severely limited her major life activities while she was in the workplace, it did not substantially limit any of her major life activities outside of the workplace. She was fine before she arrived at work and after she left work. A condition that only affects an individual's ability to do a particular job or work for a particular employer or in a certain environment, does not constitute a disability within the meaning of the above Acts.

X

EMPLOYEE NOT ENTITLED TO A LATEX-FREE MEDICAL CENTER

A former part-time nurse at a VA medical center filed a complaint alleging that she was discriminated against because of a disability when management officials terminated her employment. She described her disability as a latex allergy.

One of her doctors had found no evidence of such an allergy, but another of her doctors found that she was indeed latex allergic and that she experiences anaphylactic reactions when she comes in contact with the powdery substance used to coat the gloves. Shortly after the diagnosis, she stopped reporting to work and demanded that the entire medical center convert to powder-free latex gloves, and that she would not return to work until it had complied with her request.

Although management had offered her several accommodations, including non-latex gloves, masks, respirators, reassignments, including a reassignment to a job in a separate latex-free building outside of the main hospital, and minimization of visits to known latex-rich areas in the hospital, the complainant refused to return to work. She claimed that, even with such accommodations, she might still come into contact with low levels of latex powder carried by other persons or that might be airborne and could be inhaled.

Approximately one year after she stopped working, management terminated her employment. The complainant alleged that her termination was in violation of *The Rehabilitation Act*, as management failed to grant the accommodation she had requested.

OEDCA disagreed and issued a final agency decision finding that the Department did not violate the Act. On appeal, the EEOC's Office of Federal Operations affirmed OEDCA's decision. The Commission found that, even assuming for the sake of argument that the complainant's condition constituted a "disability", management had satisfied its obligation to offer a reasonable accommodation. The Commission noted that an employee is not entitled to the accommodation of his or her choice, but instead, is entitled only to a reasonable accommodation. Aside from speculating about the slight possibility of still coming into contact with latex powder, the complainant presented no evidence that the accommodations offered by management were not reasonable.

XI

VA PHYSICIANS AND OTHER "TITLE 38" EMPLOYEES ENTITLED TO APPEAL "RIFs" TO THE MERIT SYSTEMS PROTECTION BOARD

(The following article is reproduced with permission of "Fedmanager". For other articles of interest to Federal managers, supervisors, and employees, visit the "Fedmanager" website at: www.fedmanager.com.)

Over the past decade, federal personnel law has changed from a generally uni

form code under Title 5 to a "technicolor" array of special authorities woven throughout the United States Code. Under these new systems, it can be anyone's guess as to which rules apply.

One recent federal case highlights the confusion that can arise. The Department of Veterans Affairs let go a physician under the agency's own reduction in force policy, which gives the agency broad discretion in conducting RIFs. The physician was covered by Title 38 personnel rules along with other healthcare professionals at the agency, making these employees different in many ways from ordinary civil service employees. However, the employee appealed her layoff to the MSPB, claiming that the more employee-generous RIF rules under Title 5 should apply.

The MSPB and the Federal Court of Appeals for the Federal Circuit agreed, finding that the comprehensive Title 5 RIF law trumped Title 38 personnel rules. The Court based its reasoning on the fact that, in the absence of overriding provisions in Title 38 or elsewhere, "non-hybrid" DVA medical professionals are covered by many Title 5 provisions, including those relating to discrimination, the right to petition Congress, work injury compensation, unemployment compensation, life insurance, and health insurance. (*James V. Von Zemenszky*, U.S. Court of Appeals for the Federal Circuit, 00-3418, April 1, 2002; 2002 U.S. App. LEXIS 5371)

XII

DENIAL OF EMPLOYMENT OPPORTUNITIES BECAUSE OF MEDICAL CONDITIONS THAT POSE A RISK OF HARM – THE "DIRECT THREAT" DEFENSE

The following are excerpts from an article[1] that addresses the always-difficult question of whether an individual with a disability may be denied or not retained in a position, the essential duties of which might pose a direct threat of harm to the individual or to others because of the disability. Some of the issues discussed in the article were the subject of a recent U.S. Supreme Court decision, Chevron U.S.A. v. Echazabal, decided on June 10, 2002.

The Equal Employment Opportunity Commission (EEOC) and its administrative judges have, over the last several years, ruled against the VA in several cases involving similar claims of disability discrimination. The cases typically involved a refusal to hire applicants, or retain employees, due to preemployment or fitness-for-duty medical examinations in which the VA's employee physician determines that the duties of the job could pose a health or safety risk. The complainants successfully alleged that, despite their medical condition, they were able to perform the core duties of the job, with or without

[1] The article, written by Charles R. Delobe, was published in *Employment in the Mainstream*, Vol. 21, No. 5, Sept. – Oct. 1996.

reasonable accommodation, and without a significant risk of substantial harm to themselves or others.

For purposes of this discussion, we will assume that the individual has a medical condition that qualifies as a "disability" under applicable law and regulations. We will also assume that he or she otherwise satisfies all qualification and/or appointment criteria for the position desired or held. Assuming these facts, the question that remains, and the one addressed herein, is what medical and other evidence must be examined in order to justify a conclusion that, even with reasonable accommodation, the individual's disability would pose a significant risk of substantial harm to the individual [2] or to others.

As a general rule, when a mental or physical disability poses a "direct threat" to the health or safety of the individual or others, and the threat cannot be reduced or eliminated by reasonable accommodation, the employer may discharge the employee or refuse to hire the applicant. An obvious example is someone with a severe mental illness who threatens to kill a supervisor. Similarly, an individual with narcolepsy who frequently and suddenly loses consciousness could be denied a job as a carpenter, the essential functions of which frequently require use of power saws and other dangerous equipment. Unfortunately, most cases in this area are not so obvious and require a more careful analysis before a decision to exclude an individual can be made.

When an employer relies on medical evidence to disqualify a person because of a disabling medical condition, it has an affirmative obligation to ensure that any such risk determination is based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

Unfortunately, many risk determinations fail to satisfy the above standard. In most of these cases, the principle issue is the degree of the risk caused by the disability. When a medical officer finds that an individual is or would be "at risk" in a particular job, the finding is usually based on a combination of factors that reflect both a genuine concern for the health or safety of the individual, as well as an often unstated concern for the employer's liability should harm later result if the individual is hired or not removed. While these motives may seem reasonable, they can, and often do, run afoul of the requirements of the *Rehabilitation Act* and *The Americans with Disabilities Act.* In many cases, the physician is merely attempting to avoid even the remotest of possi

[2] The EEOC's regulations permit employers to assert probability of substantial harm to the disabled individual as an affirmative defense, even though *The Americans with Disabilities Act* refers only to direct threats to the health or safety of "others". 29 C.F.R. Section 1630.2(r). The Supreme Court's recent decision in the Chevron case upheld the validity of the EEOC regulation.

bilities that future harm and liability may result.

In general, an employer is not permitted to deny an employment opportunity to an individual with a disability merely because a medical officer has concluded that the duties of the job would create an "elevated risk." Both the courts and the EEOC have rejected the "elevated risk" standard as inappropriate since even a remote possibility of some imagined future harm (*i.e.*, even a minute increase in the risk) could be cited as a justification for blocking the employment opportunities of almost all persons with a disability.

Instead, the appropriate question is whether, *in light of the work and medical history of the individual*, employment in a particular job would pose a *reasonable probability of substantial harm.* The risk, then, must be more than simply "elevated"; it must be *significant*. Except in certain cases discussed below involving inherently dangerous positions, EEOC has interpreted this standard as requiring *a "high probability of substantial harm",* as opposed to a mere possibility. A speculative or remote risk is insufficient. Also insufficient is the conclusion that a "greater chance" of future injury or harm might occur.

In one case involving the VA, an EEOC administrative judge found discrimination where a VA physician had recommended against hiring an applicant with uncontrolled high blood pressure for a position that occasionally required some physical exertion. At the hearing, the physician testified that the risk in question was a possibility, not a probability. When asked to quantify the risk, he stated that it was "small, pretty small", but that "rare things happen." As is typically the case, no specific findings of fact were made to support the recommendation and no consideration was given to the complainant's work history. The physician simply followed the normal practice of checking a block on the medical report signifying his recommendation not to hire. At the EEO hearing the complainant presented evidence showing a history of uncontrolled high blood pressure, as well as a history of having previously worked with that condition in a similar position without problems.

To avoid violating the *Rehabilitation Act* and *The Americans with Disabilities Act*, a more individualized assessment is therefore necessary. The factors to be considered in such an assessment include the following: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, (4) the imminence of the potential harm, (5) the actual duties of the position at issue, and (6) assuming the existence of a significant risk, whether that risk can be reduced to a more acceptable level by means of reasonable accommodation.

When examining these factors, some of the relevant evidence that should be considered include the medical history of, and input from, the individual with the disability; the past experience of the

individual with the disability in similar positions; and opinions of medical doctors (VA or otherwise), rehabilitation counselors, or physical therapists with expertise in the disability, provided they are aware of the exact nature of the job in question and have direct knowledge of the individual with the disability.

Hence, determinations not to hire must be based on more than just a medical report from the employee physician containing a one-sentence recommendation not to hire. The determination must be based on an assessment of both the probability and the severity of potential harm with respect to the job in question. For this reason, the EEOC has rejected as insufficient a medical officer's generalized conclusion that, "as a rule", persons with the complainant's condition posed a risk of self-injury.

The assessment must be tailored to the individual, taking into consideration the essential duties of the position actually performed and the other factors listed above. Hence, such a risk determination can only be made on a case-by-case basis, relying on objective factual evidence and medical analysis -- not on subjective perceptions, general fears, patronizing attitudes, or stereotypes -- about the nature or effect of a particular disability.

For example, generalized fears about risks due to an employment environment, such as possible exacerbation of a disability because of stress, cannot be used to disqualify an individual with a disability. The same is true for fears about risks to disabled individuals in the event of an evacuation or other emergency.

Since an individual assessment is required, it might be possible for a medical officer, who has examined two persons with the same type of disability, and who are applying for the same job, to conclude that one, but not the other, is medically qualified. A case involving a Treasury Department law enforcement officer with a bipolar disorder is illustrative. The job in question involved the use of firearms in life-threatening situations and required unimpaired judgment at all times. The medical evidence indicated that as long as the agent was taking his lithium medication as prescribed, and having his blood lithium level checked regularly, the disorder posed no probability of harm. His medical history, however, showed that he was not doing so. Because of his demonstrated unreliability in this regard, the Commission concluded that he was not a "qualified person with a disability." The Commission hastened to note, however, that its decision was based solely on the agent's failure to take his prescribed medication and blood lithium tests. It further noted that individuals with bipolar disorders are not foreclosed from holding this position and that the agency would have to make an individual assessment of each person's ability to perform the essential functions of the job without endangering the health and safety of himself or others.

When a medical condition has intermittent symptoms that would only pose a significant risk if experienced in conjunction with a specific aspect of the individual's duties, the risk determination must examine the likelihood of the intermittent symptoms and the duties in question occurring simultaneously. In one case, a complainant had a heart condition, known as W.P.W. Syndrome, which causes cardiac rhythm disorder in about 25% - 40% of the diagnosed population. The complainant, who had no history of symptoms and was otherwise in good health, was rejected for a position as a U.S. Park Policeman, a job that could require, albeit infrequently, the use of a firearm. The EEOC found for the complainant, concluding that, since he had never experienced the disorder symptoms, the likelihood of such symptoms and his use of a firearm occurring at the same time was "quite remote."

When conducting an individual assessment, it is important to determine the nature of the duties actually performed in the position at issue. Position descriptions, while helpful, tend to be broad in scope and may not always accurately describe the duties actually performed in the service or office where the position exists. In some cases, certain duties listed in the PD are rarely, if ever, performed, while in other cases the position may involve important duties that, for whatever reason, are not listed in the PD. Not only do the duties of jobs in the same grade and series differ from station to station, they may also differ from ward to ward, or service to service, within the same facility. An assessment must carefully consider what the incumbent actually does on a day-to-day basis.

Under no circumstances may the issue of possible future liability be a factor in making the risk-of-harm determination. It is not unusual for fears to arise about the increased risk of a future lawsuit or the costs associated with some future injury or illness related to the disability. These fears stem, in part, from the belief that disabled employees may be more likely to have or cause accidents. Excluding disabled persons because of such fears violates the *Rehabilitation Act*. As long as disabled persons can perform the duties of the job with or without accommodation, and without a high probability of substantial harm to themselves or others, they may not be excluded because of fears about possible future liability.

Even assuming for the sake of argument that the above described factual and medical analysis points to a high probability of substantial harm, the employer may not remove or refuse to hire the individual without first determining if a reasonable accommodation would either eliminate the risk, or reduce it to an acceptable level.

Previous editions of the *OEDCA Digest* have examined the reasonable accommodation requirement in detail. (See the 7-part series on reasonable accommodation that began in the Winter 2000

edition (Vol. III, No. 1).[3] If there is no reasonable accommodation that would either eliminate the risk, or reduce it to an acceptable level, the employer may then remove or refuse to hire the individual.

When confronted with a "direct threat" case, HR staff and medical officers might find it helpful to use the following 5-step procedure, sometimes referred to as a "Job Analysis", for conducting the required individualized assessment and accommodation determination.

1. Identify Job Requirements -- in conjunction with officials from the service or unit where the vacancy or job exists, a determination is made by the HRMS of the actual job requirements and work environment regarding that particular vacancy or job, and in particular, its purpose and essential functions;

2. Identify Risk(s) -- The medical officer identifies the type of disability and the specific abilities and limitations of the individual, noting the specific risk posed by the medical condition based on the individual's medical and work history, and other relevant factors such as the duration of the risk, the nature and severity of the potential harm, the likelihood that the harm will actually occur, and the imminence of the potential harm. The medical officer quantifies the likelihood of the harm occurring (*e.g.*, 60% chance).

3. Identify Problem(s) -- Both HRMS and the medical officer compare the job requirements and the medical limitations to identify incompatibilities that exist between the known limitations of the individual and the job requirements and/or work environment.

4. Identify and Evaluate Remedial Alternatives -- Develop a list of potential remedies to resolve the identified problem(s); that is, accommodations that would allow the individual to perform the essential duties of the job both adequately and safely. The disabled individual should be allowed some input in fashioning an accommodation. The individual's preference in this regard, although it should be given primary consideration, is not controlling. The employer, after evaluating possible alternative remedies, may choose a less expensive or less disruptive alternative that is also effective. This identification and evaluation process should be documented in writing. Assistance in identifying possible accommodations is available from state and local rehabilitation agencies and disability constituent agencies. If reassignment would be appropriate, include some evidence that a search was conducted to find a funded vacant position for which the individual might be qualified, the results of that search, and, if appropriate, the reasons, supported by evidence, that the individual was found to be unqualified.

5. Identify the Burden on the Employer (if any) -- If a remedial alternative (*i.e.*,

[3] http://www.va.gov/orm/oedca.htm

accommodation) would be an undue hardship, the hardship must be identified and explained in terms of costs, lost productivity, impact on other employees, *etc*. There must be evidence of the hardship provided in the assessment rather than just a mere conclusion that an accommodation would be unduly burdensome.

SUMMARY:

Medical and personnel officers must be cognizant of the factors and types of evidence to be considered in making both risk of harm determinations and reasonable accommodation and undue hardship determinations. Once a medical officer makes a preliminary determination that the duties of the job in question might pose a risk of harm to the individual or others, appropriate officials must conduct the above-described individual assessments. In doing so, they must take into consideration the actual duties of the position as performed in the unit or service concerned; the duration of the risk posed by the disability; the nature and severity of the potential harm; the likelihood of the potential harm; the imminence of the potential harm; the individual's medical and work history, including evidence relating to prior work in a similar job despite the medical condition; possible alternative remedies (*i.e.*, accommodations), including, if appropriate, reassignment; and the exact nature of the burden, if any, those remedies would impose. These determinations must be made and documented *before* any decision is taken to deny a disabled person the employment he or she seeks.

Because of the complex legal and factual issues involved in these types of cases, management should <u>always</u> seek legal advice from the VA's Office of Regional Counsel before denying an employment opportunity based on a perceived health or safety threat to the disabled individual or to others.